IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MASSACHUSETTS TRUST COMPANY, a Corporation,
Appellant,
vs.
LOON LAKE COPPER COMPANY, a Corporation, and J. WEBSTER HANCOX, as Receiver of the LOON LAKE COPPER COMPANY,
Appellees.
No. 4389

APPELLANT'S OPENING BRIEF

Upon Appeal from the United States District Court
for the Eastern District of Washington
Northern Division.

F. W. DEWART,
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STATEMENT OF THE CASE.

The facts are briefly as follows:

The Loon Lake Copper Company, a Washington corporation, issued under date of November 15, 1918, bonds in the aggregate sum of $90,000 and to secure such bonds, executed a deed of trust to the Massachusetts Trust Company, a Massachusetts corporation, as trustee, both as a real estate mortgage and as a chattel mortgage, covering all of the property of the company (including much valuable mining machinery and other personal property). Default following in the payment of both principal and interest of the bonds, this action was brought to foreclose the deed of trust or mortgage, in the District Court of the United States, for the Eastern District of Washington, Northern Division. The Massachusetts Trust Company, a Massachusetts corporation being complainant and the Loon Lake Copper Company, a Washington corporation, and J. Webster Hancox as Receiver of the Loon Lake Copper Company, defendants. (Tr. 2)

J. Webster Hancox, a resident of the state of Washington, was appointed receiver of the Loon Lake Copper Company in December, 1919, by the Superior Court of Spokane County, State of Washington, and is still acting as such receiver.

The deed of trust, (Tr. 51) was dated November

15, 1918, but the following clause was added to the instrument before the closing paragraph:

> "Although this indenture is dated for cenvenience and for the purpose of reference as of November 15, 1918, the actual date of the execution thereof is November 27, 1918." (Tr. 53)

Then follows the closing paragraph, as follows:

> "In witness whereof, Loon Lake Copper Company has caused its corporate seal to be hereto affixed and these presents to be signed, acknowledged and delivered in its name and behalf by its President and Secretary, thereunto duly authorized, and Massachusetts Trust Company in token of its acceptance of the trusts hereby created, has also executed these presents this twenty-seventh day of November, A. D., 1918." (Tr. 53)

The instrument was signed by the Loon Lake Copper Company by its President and Secretary and by the Massachusetts Trust Company by its President and Secretary. It was acknowledged by the said officers of the Loon Lake Copper Company on November 27th, 1918, and by the said officers of the Massachusetts Trust Company on November 29th, 1918. (Tr. 56)

The Massachusetts Trust Company, complainant and appellant, insists that the date of " execution" of the mortgage is December 4, 1918. That it received the mortgage and signed and acknowledged it on November 29, 1918, but it received it only tentatively,

until it could be examined and approved by its counsel. That it kept the mortgage in its control, after signing it, until it was approved by its counsel, and then on December 4, 1918, it, for the first time, accepted the mortgage, so notified the Loon Lake Copper Company and sent the mortgage on for record. These allegations are admitted by the Loon Lake Copper Company.

The instrument was duly filed as a real estate mortgage, and as a chattel mortgage, in the office of the Auditor of Stevens County, Washington, where the property was located, on December 11, 1918. (Tr. 57)

The Loon Lake Copper Company filed its answer in the case admitting all the allegations of the complaint. (Tr. 15)

J. Webster Hancox, Receiver, filed his answer and alleged among several defenses, that the mortgage was executed on November 27, 1918, and was not filed within ten days thereafter, and therefore, so far as the chattel mortgage was concerned, was void as to creditors. (Tr. 16)

The District Court rendered its decision and entered its decree for the foreclosure of the realty, but held that the mortgage was not filed as a chattel mortgage within ten days of its execution, so held

that the chattel mortgage could not be foreclosed. (Tr. 26)

Remington's Compiled Statutes of the State of Washington (Sec. 3780) provide as follows:

> "A mortgage of personal property is void as against all creditors of the mortgagor, both existing and subsequent, whether or not they have or claim a lien upon such property, and against all subsequent purchasers, pledgees, and mortgagees and encumbrancers for value and good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without design to hinder, delay, or defraud creditors, and unless it is acknowledged and filed within ten days from the time of the execution thereof in the office of the county auditor of the county in which the mortgaged property is situated as provided by law."

The only question to be determined in this case on appeal is: Was the filing of the mortgage on December 11, within ten days of the execution of the mortgage, or in other words, What was the date of acceptance of the deed of trust and mortgage by the Massachusetts Trust Company?

SPECIFICATION OF ERRORS

(1) The Court erred in making the following finding in its Decree (Tr. 27):

> "That said deed of trust was * * * accepted by the Massachusetts Trust Company on or about

> November 27th, 1918, and not later than November 29th, 1918, and that the said trust deed was executed by both parties on or about the 27th day of November, 1918, and not later than November 29th, 1918."

(2) The Court erred in making the following finding in its decree (Tr. 28):

> "The Court finds that the said trust deed does not constitute a lien on any of the personal property owned by the said Loon Lake Copper Company as against the Receiver and the creditors of the Loon Lake Copper Company, and that said trust deed is void as to them for the reason that said trust deed was not filed as a chattel mortgage within the time required by the laws of the State of Washington, to-wit, within ten days after the execution of said instrument, all as required by Section 3780 of Remington's Compiled Statutes of the State of Washington."

(3) The Court erred in its decree denying appellant's prayer for foreclosure of said trust deed against the personal property of the Loon Lake Copper Company in the hands of said J. Webster Hancox, as Receiver, and covered by said trust deed.

(4) The Court erred in holding that the chattel mortgage described in the bill of complaint was executed before the same was accepted by the Massachusetts Trust Company on December 4th, 1918, and in failing and refusing to hold that said chattel mortgage was executed on December 4th, 1918.

(5) The Court erred in failing and refusing to hold that said chattel mortgage was accepted by said

Massachusetts Trust Company on December 4th, 1918.

(6) The Court erred in failing and refusing to hold said chattel mortgage to be a valid lien on the personal property of said Loon Lake Copper Company and that complainant was entitled to foreclose the same against the personal property of said Loon Lake Copper Company in the hands of J. Webster Hancox, its Receiver.

ARGUMENT

Appellant submits:

I.

That the mortgage was not executed until it was accepted by the Massachusetts Trust Company, the grantee, on December 4, 1918.

II.

The date of the instrument or of its acknowledgment is only presumptive evidence that it was executed on that day, and the true date or time of execution may be shown by parol evidence in contradiction of the date as it appears by the deed or by record.

III.

The evidence is positive and uncontradicted that

the mortgage was accepted by the Massachusetts Trust Company on December 4, 1918, and not before.

IV.

That the chattel mortgage was duly filed within ten days of its execution, is legal, and may be foreclosed by appellant.

I.

THAT THE MORTGAGE WAS NOT "EXECUTED" UNTIL IT WAS ACCEPTED BY THE MASSACHUSETTS TRUST COMPANY, THE GRANTEE, ON DECEMBER 4, 1918.

The Supreme Court of the State of Washington in a case construing this very statute regarding the execution of a chattel mortgage said:

> "Was the filing of this mortgage on December 21 within the time provided for? We think it was. The date of the mortgage, December 9, did not alone determine its 'execution' as that word is understood and interpreted in statutes of a like character. The execution of a chattel mortgage means and includes the doing of those formal acts necessary to give the instrument validity as between the parties. There certainly could be no validity to a mortgage without a delivery and acceptance. One cannot be made a mortgagee unless there is some act on his part which can and does express his relation to the instrument. There must be a 'meeting of the minds' in this sort of relation as in any other contract. Without these formalities there is no

mortgage. *Jones, Chattel Mortgages*, p. 104. The word 'execute' when applied to a written instrument, unless the context indicates that it was used in a narrower sense, imports the delivery of such instrument. *LeMesnager vs. Hamilton*, 101 Cal. 532; 35 Pac. 1054; 40 Am. St. Rep. 81. In *Brown vs. Westerfield*, 47 Neb. 399; 66 N. W. 439; 53 Am. St. Rep. 532, 'execution' was held to include all acts essential to the completion of the instrument. A very similar case to the one before us will be found in *Hornbrook vs. Hetzel*, 27 Ind. App. 79, 60 N. E. 965; the mortgage being dated June 25th, but not delivered nor filed until Aug. 4th. The court says 'delivery was necessary to its execution. The statute requires that a chattel mortgage must be filed for record in the office of the recorder of the proper county within 10 days after its execution. As there was no execution until its delivery, the mortgage was recorded in time.' For other cases in point see: *Solt vs. Anderson* 67 Nb. 103, 93 N. W. 205; *Arrington vs. Arrington* 122 Ala. 510, 26 South, 152; *Shaughnessey vs. Lewis*, 130 Mass. 355; *Wells vs. Lamb*, 19 Neb. 355, 27 N. W. 229."

Fenby vs. Hunt, 53 Wash. 127 (P. 130).

The authorities are numerous and we believe unanimous to the same effect.

"Acceptance by grantee is an essential part of delivery."

3 *Washburn Real Property* 4th Ed. p. 292.

"Delivery of a deed includes a surrender and an acceptance, both of which are necessary to its completion. This must be the result of contract, the meeting of two minds, the accord of two

wills. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive, and this accord of wills must be evinced in some way to show the unequivocal intention of both parties that the instrument shall take effect according to its purport and tenor."

Best vs. Brown (N. Y.) 25 Hun. 223-4 (citing *Fisher vs. Hall*, 41 N. Y. 416; *Brackett vs. Barney*, 28 N. Y. 333.)

"Delivery of a deed includes the surrender and acceptance. Both are necessary to the completion of the delivery. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive, and this meeting of minds must be evidenced in some way to show the unequivocal intention of both parties that the instrument shall take effect according to its purport and tenor."

Rousseau vs. Bleau 14 N. Y., Supp. 712, 716; 60 Hun. 259.

"There must be not only a parting with control of the deed by the grantor with the present intention that it shall operate as a conveyance of the land, but there must likewise be an acceptance, either by the grantee, or by some one for him—*Devlin on Deeds* Par. 278 et seq."

Smith vs. Moore 149 N. C. 185 (62 S. E. 892).

"To constitute a good delivery, a deed must not only pass from the actual and constructive control of the grantor, but the grantee must accept the deed."

McCune vs. Goodwillie 204 Mo. 306 (102 S. W. 997).

"To constitute the delivery of a deed, there must not only be a delivery by the grantor, but an acceptance by the grantee."

Bank of Healdsburg vs. Bailhace 65 Cal. 327 (4 Pac. 106).

"Acceptance by a grantee is an essential part of the delivery of a deed."

Powell vs. Banks 146 Mo. 620 (48 S. W. 664).

"The term 'delivered' when used in reference to a conveyance, implies acceptance. There may be delivery in escrow, and there may be a transfer of manual possession for examination or other purposes, but without acceptance there is merely a tender. Delivery implies both tender and acceptance."

Tate vs. Clement 176 Pa. 550 (35 Atl. 214).

Wigmore in his book on Evidence (1905 Edition) in considering Parol evidence, rules, Delivery and Intent, says (Volume IV p. 3374):

"The act must be final in its utterance. it does not come into existence as an act until the whole has been uttered. As almost all important transactions are preceded by tentative and preparatory negotiations and drafts, the problem is to ascertain whether and when the utterance was final; because until there has been some finality of utterance there is no act. The necessity for the delivery of a document, and the nature of a delivery, are here the most usual questions in practice."

And on page 3382:

"A legal act does not come into existence as such until its utterance is final and complete. All transactions require an appreciable lapse of time for their fulfillment; most important transactions in writing are consummated only after successive inchoate acts of preparation, drafting and revision. Moreover, the written terms may be prepared with a precision which leaves nothing to alter (as it turns out), and still may be for a while retained for reflection or submitted for suggestion, without as yet any final adoption. Until some finality of utterance takes place, there is no legal act. Whenever, therefore, certain conduct or writing is put forward against a party as his purporting act, no principle prevents him from showing that there never was a consummation of the act."

And on page 3384:

"There is, therefore, no invariable mark of finality for a deed—whether it be the act of writing, or of sealing, or of manually delivering or of publicly recording—subject to certain usual presumptions of conduct, the circumstances of each case must control."

And on page 3387:

"It also follows that the date of a document's execution may be established by proving the actual time of the conduct, regardless of any statement of date contained in the writing; because the time of finality of the utterance, as a legal act, is something essentially independent of and exterior to the writing itself."

And on page 3403:

"The third element of every act, its finality of utterance—usually marked by the delivery of

the instrument—is equally governed, in respect to the competition between intent and expression, by the principle of reasonable consequences—whether the act has been completed, or delivered, is not to be determined by the actual intention of the actor, but by the inquiry whether his conduct produced as a reasonable consequence the appearance of finality to the other person. Where the other person is an immediate party to the transaction, and the mutual understanding is that the document has not yet been finally issued and delivered, there is no difficulty; in such cases the first party is of course not to be charged with the document."

II.

THAT THE DATE OF THE INSTRUMENT OR THE DATE OF ITS ACKNOWLEDGMENT IS ONLY PRESUMPTIVE EVIDENCE THAT IT WAS EXECUTED ON THAT DAY, AND THE TRUE DATE OR TIME OF EXECUTION MAY BE SHOWN BY PAROL EVIDENCE IN CONTRADICTION OF THE DATE AS IT APPEARS BY THE DEED OR BY RECORD.

Wigmore says, in his work cited above, on Evidence, on page 3387:

"It also follows that the *date* of a document's execution may be established by proving the actual time of the conduct regardless of any statement of date contained in the writing; because the time of finality of the utterance, as a legal act, is something essentially independent of and exterior to the writing itself."

We believe that there is no authority questioning this, and that there can be no clearer statement of the legal doctrine.

Jones on Mortgages (7th Edition) Vol. 1, on page 107, says:

> "A mortgage is not invalid although it is not dated, or has a false date, or an impossible one, as, for instance, February 30th, provided the real day of its date or delivery can be proved. The date, being no part of the substance of the deed, may be contradicted. The true date or time of execution may be shown by parol evidence in contradiction of the date as it appears by the deed or by record."

And says:

> "If material at all, the date is only necessary to fix the time of payemnt of the debt secured."

And again in the same volume, on page 775, says:

> "The fact of the acknowledgment of the deed at a certain date is not by itself evidence that it was delivered at that time, or was ever delivered, though this has been said to be presumptive evidence."

In Williston on Contracts (1920) Volume I, p. 420-421, it is said:

> "The final requisite for the validity of a deed is delivery. Until delivery it is ineffectual though signed, sealed and assented to by the parties as an expression of the bargain between

them; and when once delivered it is binding though redelivered for safe keeping. It matters not when the instrument is dated; it becomes effectual when delivered, though the execution is presumed in the absence of evidence to the contrary to have taken place on the day on which the deed is dated."

"The date of a deed or mortgage, is at most only presumptive evidence of the time of delivery, and this presumption may always be rebutted by proof, as in the case at bar."

Banning vs. Edes, 6 Minn. 270.

"Professor Washburn in his work on real property says:—'But though a presumption would arise that the deed was delivered and took effect on the day of the date, if there was nothing offered in evidence to control this, it is always competent to show that the date inserted was not the true date of its delivery.' "

McMichael vs. Carlyle, 53 Wisc. 504.

"The rules of law, as applied in construing the dates of other instruments, even the most solemn, such as deeds and writings under seal, certainly are, that the written date is not conclusive evidence of the time of the transaction. This, when controverted and material, may be proven by extraneous evidence notwithstanding a written date."

Lee vs. Mass. Fire and M. Ins. Co. 6 Mass. 207.

"The real date of the deed is the time of its delivery."

Kent C. J., in Jackson vs. Schoonimeker 2 Johns. 234.

"It has been so long and so well known that the date of an instrument is only presumptive evidence that it was executed on that day, and that testimony as to when it was actually signed and delivered, is admissible, that we will only cite *Abrams vs. Pomeroy*, 13 Ill. 134, cited by defendant."

Davidson vs. Poague 263 Fed. 876 p. 878 C. C. A. 7th Circ.

And this has been expressly decided by the Supreme Court of the United States, as the correct law, and so far as we know there is no authority to the contrary.

"The condition of the bond recites: 'Whereas the said Oliver S. Beers is deputy postmaster at Mobile aforesaid,' etc.

"The first inquiry is, to what date is this recital to be referred? The district judge who presided at the trial, ruled that it referred to the office held by Beers when the bond was signed. The delivery of a deed is presumed to have been made on the day of its date. But this presumption may be removed by evidence that it was delivered on some subsequent day; and when a delivery on some subsequent day is shown, the deed speaks on that subsequent day, and not on the day of its date.

"In Clayton's case 5 Coke 1, a lease, bearing date on the 26th day of May, to hold for three years 'from henceforth,' was delivered on the 20th of June. It was resolved that 'from henceforth' should be accounted from the day of delivery of indentures, and not from the day of their date: for the words of an indenture are

not of any effect until delivery—*traditio loqui facit chartam.*

"So in *Ozkey vs. Hicks,* Cro. Jac., 263, by a charter-party, under seal, bearing date on the 8th of September, it was agreed that the defendant should pay for a moiety of the corn which then was, or afterwards should be laden on board a certain vessel. The defendant pleaded that the deed was not delivered until the 28th of October, and that on and after that day there was no corn on board; and on demurrer, it was held a good plea, because the word *then* was to be referred to the time of the delivery of the deed, and not to its date.

"And the modern case of *Steele vs. March,* 4 B and C., 272, is to the same point. A lease purported on its face to have been made on the 25th of March, 1783, habendum from the 25th of March *now* last past. It was proved that the delivery was made after the day of the date, and the Court of King's Bench held that the word *now* referred to the time of delivery, and not to the date of the indenture."

U. S. vs. LeBaron 19 Howard 73 p. 75.

"The next proposition of the District, that it was not competent for plaintiff below to show by parol that the contract was finally executed and delivered by the District at a date subsequent to the date of the contract, is without merit. The contract did not provide that the work was to be completed within one hundred and thirty-six days from its date, but 'after the date of the execution of the contract.' It is well settled that, in such circumstances, it may be averred and shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face.

"In *United States vs. LeBaron*, 19 How. 73., it was ruled that a deed speaks from the time of its delivery, not from its date: and Mr. Justice Curtis, who gave the opinion, cited Clayton's case, 5 Coke, 1: *Ozkey vs. Hicks*, Cro. Jac. 263, and *Steele vs. Mart*, 4B. and C. 272. To which the Court of Appeals added *Hall vs. Cazenove* 4 East, 477. These cases fully sustain the doctrine that parties, situated as here, are not precluded from proving by parol evidence when a deed or contract is actually made and executed from which time it takes effect."

District of Columbia vs. Camden Iron Works, 181 U. S. 453, p. 461.

In *Hathaway & Co. vs. U. S*,, 249 U. S. 460, on p. 464, the Court referring to *D. C. vs. Camden*, supra, says:

"What was there decided is merely that under such circumstances (there the contract provided that the work should be completed within a certain number of days from the date of the execution of the contract), it may be shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face."

We have cited many authorities on this point because the United States District Judge in the court below, in deciding this case, stated that he thought the following statement in the mortgage:

" 'Massachusetts Trust Company, in token of its acceptance of the trusts hereby created has also executed these presents on the day and year first above written' was signed by the officers of

> the Massachusetts Trust Company, and was binding on that Company."

And in the decree it recites:

> "Said Deed of Trust was * * * accepted by the Massachusetts Trust Company on or about November 27th, 1918, and not later than November 29th, 1918, and that the said Trust Deed was executed by both parties on or about the 27th day of November, 1918, and not later than November 29th, 1918."

(This part of the decree was written in by direction of the judge himself.)

We submit the statement in the mortgage may be binding to the extent that the trust was accepted, but it certainly is not binding that the date therein given, as the date of the Mortgage November 15th, 1918, or the inserted clause: "Although this indenture is dated for convenience and for the purpose of reference as of November 15, 1918, the actual date of the execution hereof is November 27, 1918." is the date of such acceptance.

The statement in the decree "27th day of November, 1918, and not later than November 29th, 1918," is of course inconsistent with his Honor's ruling, for if the clause quoted above is binding as he thought it was, then November 27th (and not November 15th) was the date of execution. The fact of the acknowledgment by the officers of the Massachusetts Trust Company being November 29th would not

change the fact, if the date given as the signing of the instrument becomes beyond any question, the date of the delivery and acceptance of the instrument.

But we have shown by the best legal authorities in this country, both of text book writers and of the courts, including the Supreme Court of the United States, this is *not* the law. We submit there are *no* authorities to be found contrary to those we have cited and quoted.

III.

THE EVIDENCE IS POSITIVE AND UNCONTRADICTED THAT THE MORTGAGE WAS ACCEPTED BY THE MASSACHUSETTS TRUST COMPANY ON DECEMBER 4th, 1918, AND NOT BEFORE.

The only "evidence" that the execution of the instrument was "November 27th or not later than November 29th" is the presumption arising from the date of the instrument. But as Williston says (1 Williston on Contracts, 210):

> "It matters not when the instrument is dated; it becomes effectual when delivered, though the execution is presumed *in the absence of evidence to the contrary* to have taken place on the day on which the deed is dated."

Or, in other words, the presumption vanishes as soon as there is *evidence* of what the actual date was.

In this case, all the parties to the transaction agree that the mortgage was accepted by the Massachusetts Trust Company on December 4, 1918.

Arnold Whittaker of Boston, Massachusetts, was Secretary of the Massachusetts Trust Company during 1918, and as such signed the mortgage in question. He is now Treasurer and Vice-President of the Company. He testified by deposition. He says (Tr. 31), in answer to an interrogatory:

> "It is the practice of the Massachusetts Trust Co. not to accept any trust or execute any legal document under which it is obligated in any way until such document has been examined and approved by its counsel. This deed of trust was therefore submitted to Mr. Guy A. Ham, an attorney at law, 24 Milk Street, Boston, Massachusetts, for his examination and approval, before it was finally accepted and delivered by the Massachusetts Trust Company. The document was handed to Mr. Ham about November 29, 1918, and on December 4, 1918, it was approved by Mr. Ham and on that date the formal delivery was actually accepted by the Massachusetts Trust Company and Mr. Ham was instructed to forward the instrument to Frederick W. Dewart, Esq., 801-802 Old National Bank Building, Spokane, Washington, to be recorded. This instrument, that is, the deed of trust, was actually acknowledged on November 29, 1918, but as I just stated, it was not actually accepted and delivered until December 4, 1918, on which date,

it was formally approved by our counsel and the delivery was made by him in accordance with our instructions."

And in answer to cross interrogatories he further states. (Tr. 32):

"That provision (in the deed of trust) is a statement of the facts relative to the actual date of signature, and was inserted in the deed of trust to explain the apparent discrepancy in dates. The reason the instrument was not delivered on either of said dates but was actually delivered on December 4, 1918, is as I have previously stated because the instrument was submitted to Guy A. Ham, Counsel for the Massachusetts Trust Company, for his approval and after he had approved it, the delivery of the deed of trust was actually accepted on December 4, 1918. This deed of trust was in the possession of counsel for the Massachusetts Trust Company between November 29, 1918, and December 4, 1918, for purpose of examination. After the Massachusetts Trust Company's officials acknowledged the deed of trust, which acknowledgment was on November 29, 1918, it was submitted to its counsel, Guy A. Ham, Esq., for examination and approval before it was definitely accepted by the Massachusetts Trust Company. After the instrument was approved by the counsel for the Massachusetts Trust Company, and accepted by it on December 4, 1918, *notice of the Massachusetts Trust Company's acceptance being given on that date to the Loon Lake Copper Company*, Mr. Ham forwarded it by mail to Frederick W. Dewart, Esq., 801 Old National Bank Building, Spokane, Washington, to be recorded." (Tr. 33).

> "On December 4, 1918, our counsel, Guy A. Ham, Esq., delivered the deed of trust by sending it by mail to Frederick W. Dewart, Esq., 801-802 Old National Bank Building, Spokane, Washington, who at that time was counsel and and an officer of the Loon Lake Copper Company and requested Mr. Dewart to record the instrument." (Tr. 33).

This is Mr. Whittaker's testimony, and of course he is the person who knows better than anyone else when the mortgage was accepted by the Trust Company. He was at that time the Secretary of the Trust Company, signed and acknowledged the mortgage as such, and would naturally be the official who would handle such a transaction. His testimony is not disputed in any way by any person. And it agrees with all the facts of the record.

The Loon Lake Copper Company filed its answer admitting the allegation of the complaint, that the mortgage was executed on December 4, 1918. (Tr. 14).

Mr. Dewart, who was an officer of the Loon Lake Copper Company, testified, (Tr. 34) that he received on December 9th the letter dated December 4, 1918, from Mr. Ham, copy of which is in the record attached to Mr. Whittaker's deposition and enclosing the deed of trust, and that he sent this forward the same day to Colville for recording in Stevens County, where the property is situated.

Mr. Dewart further testified that the Loon Lake Copper Company received *at its Boston office* a letter from the Massachusetts Trust Company stating that it had on December 4, 1918 accepted the mortgage, and that he had seen the letter there. (Tr. 35). Mr. Dewart's testimony on cross examination being as follows:

> "At that time I was an officer of the Loon Lake Copper Co. All this money was expended after the bond issue was made. All these purchases were made and delivered to the Loon Lake Copper Co. within a year or a little less. I have seen the other officers of the Loon Lake Copper Co. since the execution of this bond and since this suit was started, and they do not have, to my knowledge, any other record than that introduced here, except the trust deed delivered to the Massachusetts Trust Company, and except *the letter of acceptance* of December 4. That *letter of acceptance* from the Massachusetts Trust Company, dated December 4, is in Boston. *Such a lettr was sent to the officials in Boston.*
>
> "This was an issue of bonds gotten out by the Loon Lake Copper Co., which asked the Massachusetts Trust Company to act as trustee of the bond issue." (Tr. 35).

This testimony is positive, and covers the two parties to the transaction who agree as to what took place. The instrument was signed and acknowledged by the Loon Lake Copper Company on November 27th, it was signed and acknowledged by the Massa-

chusetts Trust Company on November 29, 1918, and turned over to its attorney for examination before the Company would accept it. The instrument was held by the Massachusetts Trust Company after signing it, until its attorney had passed upon it. Then the acceptance took place on December 4, 1918, the Loon Lake Copper Company was notified and the instrument sent to the attorney at Spokane for record. There is no possible break in the facts or record. They are clear, plain, and there is no suggestion of contradiction. There is no word of evidence to the contrary, and these are the facts in reality and in the record in this case.

As was said by Wigmore, p. 3403:

> "Where the other person is an immediate party to the transaction, and the mutual understanding is that the document has not yet been finally issued and delivered, there is no difficulty; in such cases, *the first party is of course not to be charged with the document.*" (Italics ours).

So the Massachusetts Trust Company and the Loon Lake Copper Company agreeing that the mortgage was not finally issued and delivered until December 4, 1918, *of course*, the party is not to be charged with the instrument before that date.

IV.

THAT THE CHATTEL MORTGAGE WAS DULY FILED WITHIN TEN DAYS OF ITS EXECUTION, IS LEGAL, AND MAY BE FORECLOSED BY APPELLANT:

The statute provides that the chattel mortgage must be filed within ten days of its execution. The Supreme Court of the State of Washington, in construing this statute in *Fenby vs. Hunt*, 53 Wash. 127, held that "execution" included the delivery of the mortgage and its acceptance by the grantee, and this is the general law.

The authorities are numerous and unanimous that the date given in a mortgage is only presumptive evidence of its delivery and acceptance, and the true date of delivery and acceptance may be shown by parol.

And the record in this case shows positively and without question that the mortgage was not accepted by the Massachusetts Trust Company until December 4, 1918.

We submit that the chattel mortgage was duly and properly filed within the time prescribed by law, and

MASSACHUSETTS TRUST VS. LOON LAKE COPPER

APPELLANT'S SUPPLEMENTAL AUTHORITIES

4398

The State Court's construction of the statute involved in this case controls this court.

Cutler vs. Huston 158 U.S. 432,39L.Ed.1040

-:-:-:-:-

Appellees have, in their brief, raised the following questions which however are not involved in this appeal.

A The question of after acquired property.

B The question of receiver's fees and expenses.

C That the bonds were sold at a discount.

The District Judge in his decree (Tr 28) found against the validity of the chattel mortgage on one ground only (that of its time of filing) and all else is, therefore, beside the question. Such questions are not before this court for review and cannot be first raised here.

Respectfully submitted

Frederick W. Dewart
Lawrence H. Brown

Counsel for Appellant

IV.

THAT THE CHATTEL MORTGAGE WAS DULY [illegible] CHATTEL [illegible] MAY BE FORE-CLOSED BY APPELLANT.

[illegible] within ten days of its execution.

[illegible] Court of the State of Washington, in con-[illegible] this statute in Fenby vs. Hunt, 53 Wash. [illegible], held that "execution" included the delivery of [illegible] by the [illegible]

[illegible] the date of a mortgage is only presumptive evi-dence of its delivery and acceptance, and the true date of delivery and acceptance may [illegible]

[illegible]

We submit that the chattel mortgage was duly and properly filed within the time prescribed by law, and

is a valid lien, that the decree of the District Court should be reversed as to the chattel mortgage and the cause remanded for correction of the decree.

Respectfully submitted,

F. W. DEWART,

LAWRENCE H. BROWN,

Counsel for Appellant.